HUNTON& WILLIAMS

HUNTON & WILLIAMS LLP
2200 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20037-1701

TEL 202 • 955 • 1500
FAX 202 • 778 • 2201

F. WILLIAM BROWNELL
DIRECT DIAL: 202 • 955 • 1555
EMAIL: bbrownell@hunton.com

FILE NO: 55788.000042

February 29, 2016

Deborah S. Hunt, Clerk
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202-3988

***United States v. DTE Energy Co., et al.*, No. 14-2274**

Appellee DTE Energy Co.'s Response to the Government's Notice of Supplemental Authority

Dear Ms. Hunt:

Pursuant to Rule 28(j), Appellees DTE Energy Co., *et al.*, respond to Appellant's February 25, 2016, Notice of Supplemental Authority.

The Government wants to enforce the Clean Air Act's New Source Review (NSR) program by second-guessing operators' preconstruction projection of whether a maintenance project is expected to cause a significant emissions increase and thus trigger the obligation to obtain a permit. Even where the operator's projection that a maintenance project will not cause an emissions increase is proven correct after the fact, the Government would still seek to "enforce" NSR by showing it would have projected an increase had it done the projection itself.

This Court rejected that theory of enforcement in its 2013 decision. *United States v. DTE Energy Co.*, 711 F.3d 643 (6th Cir. 2013). EPA's 2002 NSR Reform Rules create a "project-and-report" system for determining whether a project is a "major modification" that triggers NSR permitting obligations. *Id.* at 644. "[P]rior approval" of the projection from EPA is not required, but if the project actually causes a significant increase in emissions, the operator will be subject to enforcement. *Id.* at 650-51. "[E]nforc[ing]" NSR by second-guessing the operator's projection cannot be tolerated, because that would create, in effect, a prior approval system. *Id.* at 649.

HUNTON& WILLIAMS

The Government in *United States v. Ameren Missouri*, No.4:11–CV-77 RWS (E.D. Mo.) sought to enforce NSR in precisely the manner this Court proscribed in 2013. Now called the "Expectations Theory," this method of enforcement relies on blatant second-guessing. The Government, through its experts, would apply its own judgment to show that the operator "should have projected" a significant emissions increase, purportedly because the operator did not consider some unidentified factor. Slip Op. at 35-36.

There is no daylight between this enforcement theory and a prior approval system, which this Court unequivocally rejected. The district court in *Ameren* all but recognized that the "Expectations Theory" cannot be squared with this Court's precedent, claiming this Court's 2013 decision "interpret[ed the] regulations in a way that changes the law." *Id.* at 33. *Ameren*'s conclusion is wrong, and it is not the law in this circuit.

Sincerely,

/s/ F. William Brownell

F. William Brownell
Counsel for Appellees DTE Energy Co., et al.

cc: Counsel of Record by CM/ECF